

In re) Fair Hearing No. 15,732
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Appeal of)

The petitioner requests expungement of the substantiation by the Department of Social and Rehabilitation Services (SRS) in 1989 that she placed her then-infant child at risk of physical harm.

1. The petitioner gave birth to her third child in November, 1988. Her first two children had previously been removed from her home pursuant to a CHINS order of the juvenile court.

2. In January, 1989, SRS received a report from a relative of the petitioner that she had seen the petitioner drop the baby and shake him.

3. On January 23, 1989, an SRS investigator interviewed the petitioner at the SRS district offices. At the interview the petitioner admitted that she had dropped the baby on two occasions, but that both times were an accident, and that she had promptly called the doctor and the baby had been uninjured.

4. The petitioner also admitted accidentally burning the baby with a cigarette while she held him while the cigarette was in her mouth. At the time of the interview,

the baby had a small burn mark on the back of his head, but showed no other signs of injuries, and appeared healthy.

5. When confronted with the allegations of shaking the baby the petitioner stated that she did this often to comfort him and that he seemed to enjoy it. On her own initiative, to demonstrate for the investigator, the petitioner then took the baby in her outstretched arms with her thumbs under his arms and her fingers on the sides of his head and began vigorously shaking him. The baby immediately began to cry, and the investigator advised the petitioner to stop.

6. Mostly on the basis of the investigator's interview with the petitioner SRS determined that the report of physical abuse and risk of harm was substantiated, and it placed the report in its registry of recorded incidents of child abuse and neglect.

7. The parties do not dispute that shortly after the above investigation, a CHINS petition was filed in juvenile court on behalf of the baby, and he was removed from the petitioner's home and placed in the custody of SRS, who placed him in the home of the petitioner's husband, who was separated from the petitioner and living in the home of his relatives.

8. In 1991, the petitioner and her husband were divorced, with the husband getting custody of the child, and the child has resided with his father ever since. The

petitioner has maintained regular visitation over the years with the child, who is now 10.

9. The petitioner filed this action for expungement when she was recently denied approval to provide day care for another (unrelated) child on the basis of this past substantiation of abuse.

10. At the hearing, the petitioner disputed that her shaking the baby could have caused harm to him.

ORDER

The decision of the Department is affirmed, and the petitioner's request for expungement is denied.

REASONS

The Department of Social and Rehabilitation Services is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are "unsubstantiated". 33 V.S.A. §§ 4914, 4915 and 4916.

The statute further provides:

A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not substantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the Commissioner to establish that the record shall not be expunged.

In order to sustain its burden, SRS is required to show that the registry report is based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused . . ." See 33 V.S.A. § 4912(10).

In this case the Department's report has been shown to be both accurate and reliable as to the facts, inasmuch as it was largely based on the petitioner's admissions and the direct observations of the SRS investigator. The second prong of this test is whether a reasonable person would believe that the child is abused based on these facts. The statute at 33 V.S.A. § 4912 defines abused child, in pertinent part, as follows:

- (2) An "abused or neglected child "means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . . .

. . .

- (4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury. . . .

- (6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

In this case the evidence establishes that the petitioner's child was at risk of physical injury by the petitioner's practice of vigorously shaking him as a means to calm him, and her lack of insight that this could be

harmful. Although the Department did not place any records of the subsequent CHINS proceeding into evidence, the petitioner does not dispute that shortly after the SRS investigation the juvenile court saw fit to remove the child from her home, presumably on the basis of the same allegations.

If, as it appears, the petitioner has matured and is more experienced and sensitive in her ability to care for children, it is unfortunate that the above incident prevents her from obtaining certification to provide approved child care under SRS and DSW guidelines. However, inasmuch as the Department's decision in this matter is based on a preponderance of evidence and a reasonable application of the law, the Board is bound to affirm. 3 V.S.A. § 3091(d) and Fair Hearing No. 17.

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